

**Letter of Findings: 04-20150664  
Gross Retail Tax  
For the Years 2012, 2013, and 2014**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

### HOLDING

Indiana Equipment Rental Company was required to obtain exemption certificates from customers claiming to be exempt from sales tax under the public transportation exemption; both the delivery and return fees charged to Equipment Rental Company's customers were gross retail income subject to sales tax.

### ISSUES

#### I. Gross Retail Tax - Exemption Certificates.

**Authority:** IC § 6-2.5-5 et seq.; IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-2-1(b); IC § 6-2.5-3-2; IC § 6-2.5-3-7; IC § 6-2.5-3-7(c); IC § 6-2.5-4-1; IC § 6-2.5-8-8(a); IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-8-12](#); [45 IAC 2.2-8-12\(c\)](#); [45 IAC 2.2-8-12\(g\)](#); Black's Law Dictionary (7th ed. 1999).

Taxpayer argues it was not required to collect sales tax from customers who were in the business of providing public transportation.

#### II. Gross Retail Tax - Delivery Charges.

**Authority:** IC § 6-2.5-1-5(a); IC § 6-8.1-5-1(c); [45 IAC 2.2-4-1](#).

Taxpayer maintains it was not responsible for collecting sales tax on the price it charged its customers to retrieve from those customers equipment it had rented them.

### STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of renting trailers, trucks, containers, and other equipment.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's sales tax returns and business records. The audit resulted in an assessment of additional tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

#### I. Gross Retail Tax - Exemption Certificates.

### DISCUSSION

The Department found that Taxpayer failed to obtain exemption certificates and failed to collect sales tax from some of its customers. Taxpayer argues that it was not required to obtain exemption certificates because these customers identified themselves as being in the business of providing public transportation.

The issue is whether Taxpayer was required to obtain and retain exemption certificates from customers because it has "other evidence supporting an exempt sale . . . ."

The proposed assessment constitutes evidence that the Department's claim for the unpaid tax is valid, and each taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). In reviewing a taxpayer's argument, the Indiana Supreme Court has held, that when it examines a statute that an agency is "charged with enforcing . . . we defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party." Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC § 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

A retail merchant - such as Taxpayer - is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes . . . ." IC § 6-2.5-9-3.

Under certain circumstances, the retail merchant is not required to collect sales tax. For example, under IC § 6-2.5-8-8(a), "A person . . . who makes a purchase in a transaction which is exempt from the state gross retail tax and use taxes, may issue an exemption certificate to the seller instead of paying the tax." Once the purchaser provides the exemption certificate, the retail merchant is under no obligation to collect sales tax on the transaction. IC § 6-2.5-8-8(a) states that, "A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase."

However, Taxpayer specifically cites to [45 IAC 2.2-8-12](#) as authority for its position that it was not required to obtain exemption certificates from customers who identified themselves as being in the public transportation business.

In particular, Taxpayer cites to [45 IAC 2.2-8-12](#)(g) which provides:

An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported. (Emphasis added).

Taxpayer maintains that it has "other evidence" that its transactions with its customers were exempt.

In addition, Taxpayer cites to IC § 6-2.5-3-7 which states in part:

(c) A retail merchant that sells tangible personal property to a person that purchases the tangible personal property for use or consumption in providing public transportation under [IC 6-2.5-5-27](#) may verify the exemption by obtaining the person's:

- (1) name;
- (2) address; and
- (3) motor carrier number, United States Department of Transportation number, or any other identifying number authorized by the department.

The person engaged in public transportation shall provide a signature to affirm under penalties of perjury that the information provided to the retail merchant is correct and that the tangible personal property is being purchased for an exempt purpose.

Taxpayer argues that it has retained general information - including DOT numbers - that the customers to whom it rented equipment are in the public transportation business and this is sufficient to establish that the transactions at issue were exempt.

The Department must respectfully disagree. The statute on which Taxpayer relies requires that the public transportation purchaser "shall provide a signature to affirm under penalties of perjury that the information provided to the retail merchant is correct and that the tangible personal property is being purchased for an exempt

purpose." IC § 6-2.5-3-7(c). There is no evidence that the Taxpayer obtained such a sworn affirmation from its customers. An affirmation is defined as "[a] pledge equivalent to an oath . . . ." Black's Law Dictionary 59 (7th ed. 1999).

In the absence of such an affirmation, it is on the Taxpayer to prove that the transactions were exempt. As stated in [45 IAC 2.2-8-12\(c\)](#);

All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.

Taxpayer may have general knowledge of its customers' business or even DOT numbers for those customers, but the Department is unable to agree that this information is sufficient to establish that the individual transactions at issue were necessarily exempt from sales tax. As noted at the outset, Taxpayer bears the burden under IC § 6-8.1-5-1(c) of establishing that the proposed assessment was "wrong." Taxpayer has not met that burden.

### FINDING

Taxpayer's protest is respectfully denied.

## II. Gross Retail Tax - Delivery Charges.

### DISCUSSION

On occasion, Taxpayer will deliver rental items to its customers. Taxpayer charges a fee for those deliveries. The Department's audit assessed tax on the amount of the charges. The audit cited to [45 IAC 2.2-4-1](#) as authority for doing so. The regulation provides:

- (a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant."
- (b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:
  - (1) The price arrived at between purchaser and seller.
  - (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.
  - (3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

IC § 6-2.5-1-5(a) provides in part:

Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges[.]

However, Taxpayer indicates that it charges its customers a single fee for delivering the equipment and returning it. Taxpayer states that although it charges a single fee for both delivery and return, the sales tax at issue should be reduced by 50 percent because it believes that half of these fees are the price it charges for returning the item.

Taxpayer is carving out an exemption from "gross retail income" which is nowhere to be found in the statute. Although the statute specifically designates "delivery charges" as part of the merchant's gross retail income subject to tax, the statute is clear that gross retail income includes the "total amount of consideration" it receives for renting equipment to its customers.

The Department is unable to agree that Taxpayer has met its burden of proving under IC § 6-8.1-5-1(c) that the audit was wrong in assessing Taxpayer sales tax on the delivery and return fees. Under Indiana law, both the delivery and return fees constitute one aspect of the "total consideration" it receives for the rental of the equipment.

**FINDING**

Taxpayer's protest is respectfully denied.

*Posted: 05/25/2016 by Legislative Services Agency*  
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